Advisory Opinion 235

Parties: Jane M. Loftus / Provo City

Issued: December 30, 2020

TOPIC CATEGORIES:

Compliance with Land Use Ordinances

Interpretation of Ordinances

Where an overlay zone is applied to a base zoning district, the plain language of the respective zoning provisions must be read and interpreted together, in light of the purpose the combined regulatory scheme is meant to achieve.

A planned unit development of common-wall townhomes is zoned R2(PD), two-family residential as supplemented by the City's "Performance Development" (PD) overlay zone. Whereas the R2 zone imposes certain building requirements—such as building setbacks—to individual subdivided lots, the PD overlay provides its own development standards that address building requirements for the project as a whole. Because the PD regulations supplement the underlying zoning, an application for a deck expansion on a single subdivided lot insulated within the development is not subject to the individual lot building requirements of underlying R2 zoning where the larger development remains compliant with project restrictions under PD regulations. Accordingly, the City appropriately approved a deck permit under its land use ordinances.

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ADVISORY OPINION

Advisory Opinion Requested By:	Jane M. Loftus
Local Government Entity:	Provo City
Applicant for Land Use Approval:	Jeffry Flake & Cheryl Flake
Type of Property:	Residential
Date of this Advisory Opinion:	December 30, 2020
Opinion Authored By:	Richard B. Plehn, Attorney Office of the Property Rights Ombudsman

ISSUE

Did Provo City comply with the mandatory provisions of its land use ordinances when it approved a deck permit for a dwelling in the City's R2(PD) zoning district?

SUMMARY OF ADVISORY OPINION

Base zoning districts, delineated by fixed map boundaries, set forth lot and building requirements of diverse types. Additionally, enacted overlay zones may be used in combination with underlying zoning to supplement building standards in addressing specific types of development or projects. Where an overlay zone is applied to a base zoning district, the plain language of the respective zoning provisions must be read and interpreted together, in light of the purpose the combined regulatory scheme is meant to achieve. Because zoning ordinances are in derogation of a property owner's common-law right to unrestricted use of his or her property, the review of a land use application—including a request for a building permit—should interpret ordinances to favor the application unless a restriction is plainly stated.

Here, the planned unit development of common-wall townhomes is zoned R2(PD), two-family residential as supplemented by Provo City's "Performance Development" (PD) overlay zone. Such common-wall structures are only permissible in R2 zoning where the PD overlay is applied. Whereas the R2 zone imposes certain building requirements—such as building setbacks—to

individual subdivided lots, the PD overlay provides its own development standards that address building requirements for the project as a whole. Because the PD regulations supplement the underlying zoning, an application for a deck expansion on a single subdivided lot insulated within the development is not subject to the individual lot building requirements of underlying R2 zoning where the larger development remains compliant with project restrictions under PD regulations. Accordingly, the City appropriately approved the deck permit under its land use ordinances, assuming the deck structure complies with applicable provisions of the state construction code.

REVIEW

A Request for an Advisory Opinion may be filed at any time prior to the rendering of a final decision by a local land use appeal authority under the provisions of Title 13, Chapter 43, Section 205 of the Utah Code. An advisory opinion is meant to provide an early review, before any duty to exhaust administrative remedies, of significant land use questions so that those involved in a land use application or other specific land use disputes can have an independent review of an issue. It is hoped that such a review can help the parties avoid litigation, resolve differences in a fair and neutral forum, and understand the relevant law. The decision is not binding, but, as explained at the end of this opinion, may have some effect on the long-term cost of resolving such issues in the courts.

A Request for an Advisory Opinion was received from Jane M. Loftus on June 23, 2020. A copy of that request was sent via certified mail to Amanda Ercanbrack, City Recorder, Provo City, 351 West Center Street UT 84601, on June 26, 2020.

EVIDENCE

The Ombudsman's Office reviewed the following relevant documents and information prior to completing this Advisory Opinion:

1. Request for an Advisory Opinion, submitted by Jane M. Loftus, received on June 23, 2020.
2. Response to Advisory Opinion Request, submitted by Jeff Flake, Applicant for Provo City Building Permit, dated July 13, 2020.
3. Response to Jeff Flake letter dated July 13, 2020, submitted by Jane Loftus, dated July 22, 2020.
4. City's Response to Advisory Opinion Request, submitted by Marcus Draper, Assistant City Attorney for Provo City, dated July 22, 2020.
5. Letter from Jeff Flake, dated August 1, 2020.
6. Response to Jeff Flake letter dated August 1, 2020, submitted by Jane Loftus, dated August 10, 2020.
7. Response to City's July 22, 2020 response, submitted by Jane Loftus, dated August 11, 2020.
8. City's Response to Jane Loftus response(s) dated July 22, 2020 and August 10, 2020, submitted by Marcus Draper, received August 14, 2020.
9. Response to City's August 14, 2020 response, submitted by Jane Loftus, dated August 17, 2020.

BACKGROUND

Jane Loftus ("Ms. Loftus") is the next-door neighbor to Jeff and Cheryl Flake ("the Flakes") in Georgetown on the Park ("Georgetown"), a planned unit residential subdivision in Provo City recorded in 1984. The Georgetown subdivision features several clusters of shared-wall townhomes that are insulated from parcels outside of the project by designated open green space or other common areas under ownership of an association. The Loftus and Flake townhomes are both interior units in a particular cluster of townhomes, each sharing walls with other townhomes on either side. Each townhome sits on its own narrow lot consisting of the principal two-story dwelling at the front of the lot and a detached garage at the rear of the lot. These structures are separated by a small rear yard fenced on both sides from adjoining lots. This is the second Request for an Advisory Opinion this office has received from Jane Loftus regarding Provo City's approval of building permits for the Flakes. The relevant history is as follows.

2019 Advisory Opinion Request

As built, the Flakes' townhome featured a rear door exiting from the main story out onto a small deck[1] and staircase that lead down to the rear yard. The entire rear yard is 20' x 22' and separates the townhome from the detached garage; the yard is fenced in on both sides with a 6' privacy fence. The deck and staircase were located on the side of the townhome opposite from the shared lot line with Ms. Loftus' property. On July 1, 2019, the Flakes received a building permit from Provo City, Permit PRDK201900995 ("Permit 995") to expand the existing deck on the rear of their townhome and thereafter began construction. The proposed new deck was to consist of approximately 409 square feet attached to the rear of the townhouse, and extend the width of the property just short of the shared fence with Ms. Loftus. Ms. Loftus filed an appeal to the Provo City Board of Adjustment on July 31, 2019 to challenge the City's issuance of the deck building permit as violating Provo City's zoning ordinances. Ms. Loftus then filed a Request for an Advisory Opinion with this office on August 1, 2019.

Utah law provides that an Advisory Opinion of the Office of the Property Rights Ombudsman may be requested at any time before a final decision on a land use application by a local appeal authority; a decision on a land use application typically becomes final when a local appeal is not timely filed. Under *Fox v. Park City*, the clock for the appeal window does not start until the appealing party has actual or constructive knowledge of the facts that form the basis for objecting to the decision to issue the permit.[2]

The City's response to Ms. Loftus's 2019 advisory opinion request argued that Ms. Loftus missed the appeal window under the *Fox* standard, as she had constructive knowledge as soon as construction began. However, Ms. Loftus claimed that, upon her first contact with City staff regarding the deck, she had been denied access to view the deck permit. Because of this assertion, which was initially undisputed, our Office issued a letter on September 3, 2019 finding we had jurisdiction over the matter because her appeal appeared to be timely under the *Fox* standard, as

[1] The exact size of the original deck is disputed. While Mr. Flake's original permit application reflected that the deck was 5' x 8', Ms. Loftus alleges it actually measured 4' x 5'.
[2] 2008 UT 85, ¶ 28.

Ms. Loftus would need to see the permit to have the information required to file an appeal. However, Provo City thereafter presented evidence that contradicted Ms. Loftus' assertion. Because the factual record regarding the timeliness of Ms. Loftus appeal was disputed, and because our Office is not equipped to resolve such factual disputes, this Office issued a second letter on September 12, 2019 stating that the factual dispute would need to be resolved by the courts before it could be definitively determined that our Office had jurisdiction in the matter.

2020 (Current) Advisory Opinion Request

Permit 995 issued to the Flakes in 2019 expired by its terms on March 26, 2020, without any revised plans, inspections, or certificate of completion. The City therefore issued a certificate of non-compliance on April 20, 2020. Work continued at the site despite the non-compliance, and a "Stop Work" order was issued May 13, 2020.

On May 14, 2020, Mr. Flake applied for a remodel permit, Permit PRRN202000894 ("Permit 894"), to replace the existing single door and small window that lead out over the original deck on the rear of the home with two French doors now exiting out onto the center of the new deck. Provo City issued an approved remodel permit on June 10, 2020. While the remodel permit only refers to replacing the window with French doors, it nevertheless appears that the remodel permit has been treated as a renewed permit to complete the deck as well. The plans approved with Permit 894 include plans for the deck's construction, and contains a note that Permit 995 was never "finaled" respective to the deck. Additionally, subsequent inspections performed pursuant to Permit 894 were specifically addressed at the construction of the deck and its compliance with submitted revised plans.

On June 23, 2020, Ms. Loftus submitted the current Request for an Advisory Opinion to determine whether the City's approval of the Permit 894, including approved plans for the Flakes' deck, is compliant with Provo City ordinances and whether the City has complied with the mandatory provisions of its ordinances in approving the permit.[3]

ANALYSIS

Ms. Loftus has challenged the validity of Provo City's approval of a building permit to allow her immediate neighbor to expand a deck on his townhome. Ms. Loftus asserts the neighbor's development activity "has affected [her] light, airflow, security and quality of life."[4]

Under Utah's Municipal Land Use Development and Management Act ("LUDMA"), legal standing to challenge land use decisions is afforded to "adversely affected parties", which is defined to include persons owning property adjoining the property subject to the land use

[3] Despite the City's jurisdictional argument against the 2019 advisory opinion request to determine the issue of the deck's compliance under the permit originally issued for the deck, the City does not appear to challenge the Office's jurisdiction to now hear that same issue in reviewing approval of the 2020 remodel permit, as its submittals specifically frame the "relevant question before the Property Rights Ombudsman Office [as] whether Provo City complied with its land use ordinances in issuing the permit to Mr. Flake to build a deck." Response to Jane Loftus Response dated July 22, 2020, at page 1 (August 14, 2020).

[4] Request for an Advisory Opinion, submitted by Jane M. Loftus, received on June 23, 2020.

application in question.[5] The person challenging the land use decision on appeal bears the burden of proving that the land use authority erred.[6] On review, the final decision of a land use authority or an appeal authority is presumed to be valid and will be upheld unless the decision is arbitrary and capricious, or illegal.[7] A decision is illegal if it is based on an incorrect interpretation of a land use regulation.[8]

Because matters of ordinance interpretation are a question of law, no deference is afforded to a City's interpretation of its own ordinances.[9] Moreover, because private property rights are constitutionally protected, the law provides ample direction on how land use ordinances regulating the use of property are to be interpreted in reviewing a land use application.

While one aim of a zoning ordinance may be to protect the collective property interests of the community by placing restrictions on the individual use of property, it is the property rights of the land use applicant that carry greater weight when reviewing a land use application. Accordingly, the City has an obligation to favor such rights when it interprets its zoning ordinance.

This opinion answers whether Provo City ordinances prohibit the land use applicant's expansion of a deck on the rear of a townhome within the R2(PD) zone. We conclude that they do not. While other private restrictions may be applicable to the properties and could afford some recourse to an aggrieved neighbor,[10] the City was correct to allow the development activity under its land use ordinances.

I. Applicable Zoning Status of Georgetown Property

LUDMA gives cities broad discretion in how to address land development through ordinances, resolutions, rules, and other land use controls. A city's legislative body may divide up city territory into any number of zoning districts with diverse zoning requirements.[11] Because some specific development projects—where carefully planned—may provide desirable housing options that do not conform with any of the conventional zones and may not warrant the creation of an entirely new zone, separate provisions allowing planned unit developments may be enacted by a city, often as overlay zones. Provo City has a long list of "base zoning districts" and just as many, if not more, overlay zones.[12]

The Georgetown complex is zoned R2(PD). The code R2 is the City's designation of its two-family residential zone, which anticipates up to two dwellings on a given lot, in either attached (as in a

[5] UTAH CODE § 10-9a-801.
[6] UTAH CODE § 10-9a-705.
[7] UTAH CODE § 10-9a-801(3)(b).
[8] UTAH CODE § 10-9a-801(3)(c).
[9] *See Outfront Media, LLC v. Salt Lake City Corp.*, 2017 UT 74, ¶ 12 n.13, 416 P.3d 389, 394 (clarifying that the correct standard of review for ordinance interpretation is *de novo* review for correctness as a matter of law, while noting that the court had, in the past, wrongfully afforded some level of "non-binding deference to" a local agency's interpretation of its own ordinance).
[10] Ms. Loftus claims the deck expansion also violates the community's restrictive covenants, though she has expressed frustration at what she alleges to be a refusal on the part of the HOA to enforce applicable regulations.
[11] *See* UTAH CODE § 10-9a-505.
[12] *See* Title 14, "Zoning", of the Provo City Code. There are dozens of zoning designations, each set forth in a separate chapter in that title.

duplex), semi-detached or detached buildings.[13] Under Provo City's regulatory scheme, the suffix of (PD) to the R2 zoning designation would denote the application of the Performance Development (PD)[14] Overlay Zone in combination with the existing conventional R2 residential zone.[15]

II. Function of the PD overlay zone

The legislated purpose and objective for the PD overlay zone is to allow for "imaginative and efficient utilization of land" by permitting certain flexibilities to underlying zoning requirements that would not otherwise allow the project.[16]

For example, all buildings on a given lot under R2 zoning are subject to yard requirements that include front, side, and rear setbacks from property lines to provide space between structures on other lots.[17] These setbacks determine the buildable area of any lot.[18] At a minimum, no structure is allowed any closer than 3 feet from any property line.[19] Under the base R2 zoning, typical townhomes—subdivided lots with common-wall structures—are not allowed, unless in an approved planned development.[20]The PD overlay zone combined with the R2 or other residential zones and applied to a certain project allows flexibility in the location of buildings, including clustering dwelling units in one and two-family zones in common-wall construction.[21]

It appears to be conceded that the Georgetown subdivision, including any deck expansion, would not be legal under the existing base R2 zoning alone. However, that is not the dispute. The dispute lies in the applicability of the PD overlay zone to the specific provisions of the R2 zone, and whether the combined provisions, read together, would plainly restrict the proposed development activity.

III. Application of PD overlay to R2 zoning

The principal point of departure in the parties' respective readings of the PD provisions appears to derive from disagreement on which unit of subject property the provisions are to be applied. Nearly all of Ms. Loftus' arguments as to the deck's nonconformity are based on the R2 zone's restrictions in relation to individual lots. The R2 zone, is, after all, a conventional zoning district, which is concerned with lots as constituting the unit of single ownership and control.[22]

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[13] PROVO CITY CODE § 14.11.010.
[14] Sometimes referred to as the "Planned Development" Overlay Zone throughout the chapter.
[15] PROVO CITY CODE § 14.31.030.
[16] PROVO CITY CODE § 14.31.010.
[17] PROVO CITY CODE §14.11.080.
[18] PROVO CITY CODE §14.06.020 ("Buildable Area" means that portion of a lot or parcel which is eligible to place a building or structure and complies with the setbacks of the zone where property is located).
[19] PROVO CITY CODE §14.11.080(6)(c).
[20] PROVO CITY CODE §14.11.020(4) (providing "one-family dwelling – attached" as a permitted use only in approved planned developments).
[21] PROVO CITY CODE § 14.31.050(1).
[22] "Lot" is defined as "[a] parcel of real property shown as a delineated parcel of land", and which inferentially "is held under one (1) ownership." PROVO CITY CODE § 14.06.020.

However, Provo City points to the stated Purpose and Objectives section of the PD overlay zone, which provides that a Performance Development is "a residential development planned as a whole, single complex."[23] This, the City argues, provides that building restrictions apply to PD projects as a whole, rather than to the individual subdivided lots within the project.

We note that, in general, a statement of legislative purpose is considered a "preamble" to the operative provisions of an ordinance that neither creates nor limits rights actually given by the legislation; however, purpose language is nevertheless useful as it "provide[s] guidance . . . as to how [the ordinance] should be enforced and interpreted" and "may be used to clarify ambiguities."[24]

That development standards within a PD are to be measured by the project as a whole—as suggested by the statement of purpose—is additionally supported by the operative provisions of the PD chapter. The PD chapter makes clear that development may be planned as a PD either with, or without, subdividing the land into individual lots. In other words, a PD project may remain under single ownership, wherein multiple family dwellings and structures are occupied by residents (such as an apartment complex with rented units), or, a development may otherwise constitute a "PD subdivision"[25] wherein a project contains multiple "subdivided, one-family lots"[26] for individual ownership. However, even where the end result of a PD will be subdivided lots, the chapter requires that "[t]he area proposed for a performance development shall be in one (1) ownership or control during development to provide for full supervision and control of said development."[27]

The PD overlay zone provides its own set of development standards, which, as identified above, apply to the project as a whole as consisting of the unit of "single ownership and control" for development purposes. These development standards include design, minimum area, hazardous conditions, setbacks, natural features, landscaping, open space, and several others.[28] Thus, where the PD overlay is applied, and unless stated otherwise, development standards of the underlying zone that reference requirements based on "lots" will not apply to subdivided lots within a PD, because the PD provisions provide the express development standards for the project as a whole.

a. Setback Requirements

Ms. Loftus argues that the deck expansion does not comply with the R2's setback requirements, which provide yard requirements including required side yards, required rear yards, and prohibited projections into required yards, all of which are directed at "lots".[29] The R2 zone requires a side yard of at least 10 feet on each side, and a rear yard of no less than 30 feet, with a note that "[a]ll

[23] PROVO CITY CODE § 14.31.010.
[24] *Price Dev. Co. v. Orem,* 2000 UT 26, ¶ 23, 995 P.2d 1237.
[25] *See, e.g.*, PROVO CITY CODE §§ 14.31.070, 14.31.080(3)(c), 14.31.080(4)(e).
[26] *See, e.g.*, PROVO CITY CODE §§ 14.31.080(1)(f)(i), 14.31.080(4)(c)(i).
[27] PROVO CITY CODE § 14.31.080(1)(a).
[28] *See* PROVO CITY CODE § 14.31.080 "Minimum Performance Standards".
[29] PROVO CITY CODE § 14.11.080.

setbacks are measured from the property line."[30] Structures are generally prohibited from projecting into any required yard unless expressly stated.[31]

However, the PD overlay zone expressly addresses setbacks in its development standards, wherein it provides exactly when underlying zoning requirements of subdivided lots are to be applied. Specifically, the PD provisions state as follows:

> (1)(f) *Setbacks*. The minimum setback for all buildings (excluding fences) and parking in the periphery of the development shall be the front setback of the zone at those locations where development abuts a street and a minimum twenty (20) foot setback at those locations where development abuts other parcels of land outside the project. Departures from these setbacks must be justified by unique and unusual circumstances related to the site, or for reasons of improved design.[32]

Note, initially, that this setback requirement for buildings is stated in terms of "the development" and "the project" as opposed to lots or units. Additionally, the above setback is only concerned with "the periphery of the development," which the chapter defines as "a one hundred (100) foot depth around the perimeter of the project measured inward from the property line."[33] However, the setback provision continues, and refers to PD subdivisions, specifically, as follows:

> (1)(f) *Setbacks*.
> . . .
> (i) Notwithstanding the above provision, if the development has subdivided one-family lots which abut other parcels of land, the specific zone regulations shall apply for rear and side yard setbacks on the subdivided lots.[34]

Ms. Loftus argues that because Georgetown is subdivided into one-family lots, the specific requirements of the underlying zone apply for rear and side yard setbacks on the subdivided lots, per subsection (1)(f)(i), above. As discussed, the R2 zone contains lot setbacks for side and rear yards that would not allow the existence of the new deck, which more or less extends the entire width of the lot to the property line on either side.

However, subsection (1)(f)(i) above only applies to subdivided lots *which abut other parcels of land*. When read within the larger subsection (1)(f), it is clear that this means, specifically, "other parcels of land *outside the project.*"[35] This is further supported by the following illustration depicting setback requirements, found in the appendix to the PD chapter[36]:

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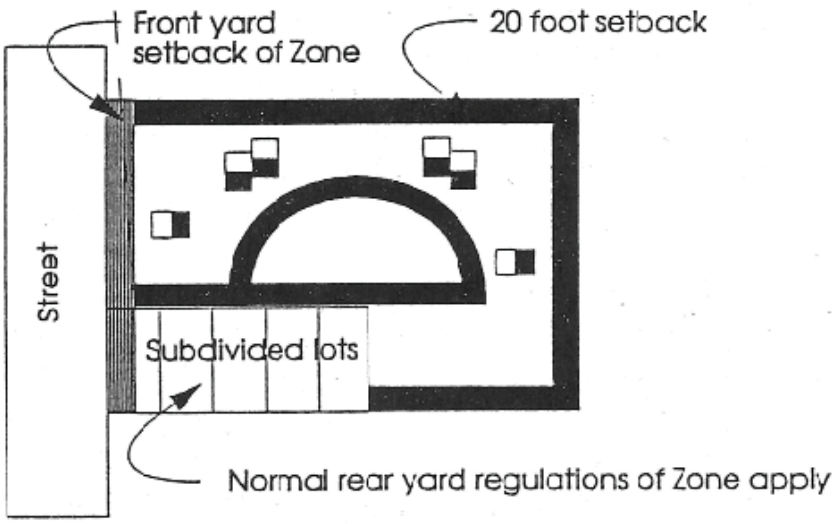
[30] *Id.*
[31] PROVO CITY CODE § 14.11.090.
[32] PROVO CITY CODE § 14.31.080(1)(f).
[33] PROVO CITY CODE § 14.31.020. Again, keeping in mind that in referencing "the property line", because the project is to remain under "single ownership and control during development," this is a reference to the property line delineating the project from other outside parcels.
[34] PROVO CITY CODE § 14.31.080(1)(f)(i).
[35] PROVO CITY CODE § 14.31.080(1)(f) (emphasis added).
[36] PROVO CITY CODE § 14.31.170, Figure 14.31.080(a).

Figure 14.31.080(a). Setbacks.



As the figure illustrates, the thick, dark border depicts the perimeter of the project which abuts other parcels of land outside the project, wherein buildings within the project are depicted as appropriately set back at least 20 feet per the requirements of subsection (1)(f), above. However, the figure also depicts subdivided lots along the perimeter which are abutting other parcels outside the project, of which the illustration notes, "Normal rear yard regulations of Zone apply," consistent with subsection (1)(f)(i).

If the PD provisions provide that this circumstance is the only instance in which setback and rear yard regulations of the underlying zone apply to subdivided lots (meaning, along the periphery), it follows then that such requirements do not otherwise apply to subdivided lots insulated within the PD project, not along the periphery.

Applied to Georgetown, because the lots owned by the Flakes and Ms. Loftus are both insulated by common area within the larger development project, and do not abut any property outside of the project, subsection (1)(f)(i) regarding application of setbacks from underlying zoning is inapplicable by its plain language. Instead, the setback requirements as provided by the PD provisions, and applicable to the project as a whole, are the only setbacks that apply to these lots.

b. Other Lot Requirements

Other than setbacks, Ms. Loftus also argues that the deck expansion does not comply with other restrictions of the R2 zone directed at lots, such as the lot coverage requirement. In the R2 zone, "all buildings, including accessory buildings and structures, shall not cover more than forty percent (40%) of the area of the lot or parcel of land."[37]

Without regard to PD provisions, in applying R2 lot requirements to the individual lots within the Georgetown subdivision, it is clear that the individual lots do not comply. As noted by the City's

[37] PROVO CITY CODE § 14.11.120(1).

Board of Adjustment, the Flakes' lot does not conform to R2 minimum lot area, minimum lot width, minimum lot depth, and maximum lot coverage requirements.[38]

To explain why the subdivided Georgetown lots and respective structures, as originally built, would be so noncompliant with R2 lot requirements if such requirements were just as applicable to property to which the PD overlay has been applied, Ms. Loftus[39] makes the assumption that the zoning requirements must have changed since the time the project was approved, wherein the lots and structures would be allowed to continue as legal nonconformities, but structures may not now be "moved, enlarged or altered . . . or occupy additional land, as "[a]ny expansion of a noncomplying structure that increases the degree of nonconformance is prohibited."[40]

Neither party has submitted a copy of applicable R2 (or PD) ordinances in effect at the time the subdivision was approved in 1984, though neither party contests that the subdivision was validly approved. Rather, there is another explanation for the City's approval of the building permit for the Flakes' Georgetown one-family lot without regard to the existing R2 lot requirements.

The City argues that whereas the PD project is treated as a whole, single complex, all lot requirements—as applied to the project as a whole and as measured from the perimeter property

[38] The Board of Adjustment provided the following table to illustrate:

	[R2 Zone]	[Flake Lot]
Minimum Lot Area	6,000 sq. ft.	1,742.4 sq. ft
Minimum Lot Width	60 ft	22 ft
Minimum Lot Depth	90 ft	85 ft
Minimum Lot Frontage on public street	35 ft	22 ft
Minimum Front Yard	30 ft	30 ft
Side Yard (interior)	10 ft	0 ft
Rear Yard	30 ft	0 ft
Maximum Lot Coverage	40%	82% [*]

*While the Board of Adjustment does not specify how it calculated this lot coverage percentage, and whether it reflects the deck as originally built or as approved by the expansion permit, the Board noted that the backyard area between the dwelling and detached garage is only 22' x 20' (440 sq ft.). Considering the lot's total area is only 1,742.4 sq. ft, it is readily determinable that the lot, as originally developed, well exceeded the R2 standard of 40% lot coverage, regardless of the deck size.

[39] Ms. Loftus obtained a written opinion from a land use attorney regarding the deck's compliance with the Provo City Code and in rebuttal to the City's defense of its approval, which was included in her submissions for this opinion. While there is no indication that the attorney authoring these letter(s) formally represents Ms. Loftus in this matter, because Ms. Loftus relies on this written opinion as support for her positions, throughout this advisory opinion we will refer to the statements and arguments of this attorney as representing those of Ms. Loftus.

[40] PROVO CITY CODE §§ 14.36.040, 14.36.050.

line of the project—are expressly met by way of dedicated open space and common area, and are not implicated by further development on and within the insulated subdivided lots.[41]

Ms. Loftus takes issue with this interpretation and argues that it is "not logical or typical of how land use regulations are interpreted," asserting that "[a] lot is a lot, a yard is a yard, and a setback is a setback," and that to not subject the subdivided lots within the R2(PD) zone to R2 requirements that are expressly addressed to "lots" amounts to a "torture" of the code's plain language. Ms. Loftus additionally argues that current building configuration and lot coverage cannot be disturbed because the spaces designated for yards on the subdivided PD lots must have been included in the required "open space" for the PD project as approved.[42]

We conclude that the City reaches the right conclusion regarding compliance of the subdivided Georgetown lots, though we employ a different analysis to reach that conclusion. Rather than calling the entire PD project a "lot" in order to subject the entire project to each specific lot requirement of the R2 zone, which in this case happens to be met by its sheer size, we conclude that where the PD overlay zone is combined with the R2 or other residential zone, the development standards for the project area supplant individual lot requirements, except where stated. Whereas subdivided lots in the R2 zone must all meet minimum lot requirements, including permissible lot coverage,[43] minimum lot area,[44] minimum lot width,[45] and minimum lot depth,[46] such requirements are not applicable to subdivided lots within a PD subdivision, which is instead only

[41] To illustrate, the City cites to the following table provided by the Board of Adjustment:

	[R2 Zone]	Georgetown on the Park
Minimum Lot Area	6,000 sq. ft.	231,300 sq. ft
Minimum Lot Width	60 ft	650 ft
Minimum Lot Depth	90 ft	370 ft
Minimum Lot Frontage on public street	35 ft	880 ft
Minimum Front Yard	30 ft	30 ft
Side Yard (interior)	10 ft	50 ft
Rear Yard	30 ft	30 ft
Maximum Lot Coverage	40%	30% Lot Coverage

[42] PROVO CITY CODE § 14.31.080(4). "Open Green Space" is defined to mean "planned open area suitable for relaxation, recreation or landscaping which may be held in *common or private ownership* that is unoccupied and unobstructed by buildings and hard surface . . ." § 14.31.020 (emphasis added). The fact that the open space requirement may be fulfilled by property in either common or private ownership makes this a valid argument, as it seems that the open space requirement could be fulfilled by including private yard portions of subdivided lots.

[43] PROVO CITY CODE § 14.11.120(1) ("In an R2 zone, all buildings, including accessory buildings and structures, shall not cover more than forty percent (40%) of the area of the lot or parcel of land").

[44] PROVO CITY CODE § 14.11.030 ("The minimum area of any lot or parcel of land in the R2 zone shall be six thousand (6,000) square feet").

[45] PROVO CITY CODE § 14.11.040 ("Each lot or parcel of land used for a one-family dwelling, except corner lots, shall have an average width of not less than sixty (60) feet").

[46] PROVO CITY CODE § 14.11.045 ("Each lot or parcel of land in the R2 zone shall have a minimum lot depth of ninety (90) feet").

subject to the project development standards including *Minimum Area*,[47] *Open Space*,[48] *Size of Dwellings and Dwelling Structures*,[49] *Landscaping Per Unit*,[50] and others, including applicable PD *Setbacks*, as discussed previously.[51]

Ms. Loftus additionally proposes a hypothetical: what would have happened if the developer had come into the building department soon after approval in 1984, before any structures were built, and asked for a permit to build monolithic buildings covering 100% of the lots by infilling the designated space between the dwelling and the detached garage as shown in the original plan? Ms. Loftus answers her question by concluding that, under the City's interpretation, the building department would be legally required to approve the building plan.

Despite Ms. Loftus's incredulity at such an outcome, it is nevertheless correct. The project's minimum "open space" requirement does not appear to rely on any spaces designed for rear yards within the subdivided PD lots.[52] In that case, nothing prohibits the lateral infill of the subdivided lots with additional structures, though the provisions *do* expressly require visual relief in façade and roof line,[53] and additionally limit further vertical development by imposing maximum heights on buildings within a PD to mitigate potential effects of such a proposal.[54]

Just because a developer's proposed plan for initial development does not utilize 100% of the available lot building area or envelope under applicable standards, does not mean that the developer (or subsequent lot owners) cannot thereafter further develop the available area consistent with the same standards. The building size, coverage, and configuration within each subdivided lot remained within the discretion of the developer, subject to applicable standards. They were likely designed at the time according to what was considered to be the most desirable product; and while the creation of private covenants and restrictions on the properties may serve to protect the developer's design, Provo City cannot enforce private agreements and does not have the discretion to disallow any such changes that are not prohibited by the applicable zoning regulations.

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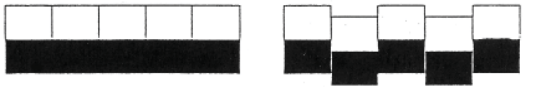
[47] PROVO CITY CODE § 14.31.080(1)(d) (minimum land area for a PD in the R2 zone is 2 acres).
[48] PROVO CITY CODE § 14.31.080(4)(a) (minimum percentage of Open Green Space (OGS) is .40 for the R2 zone, assuming no density bonuses).
[49] PROVO CITY CODE § 14.31.080(2)(f) (one-family dwellings shall meet the minimum floor area requirements of the underlying zone); *see also* PROVO CITY CODE § 14.34.310.
[50] PROVO CITY CODE § 14.31.080(4)(e) (A minimum of three (3), one and one-half (1 1/2) inch caliper deciduous trees or four (4) foot tall evergreen trees, and four (4) shrubs shall be planted for each lot in a PD subdivision).
[51] PROVO CITY CODE § 14.31.080(1)(f).
[52] As noted in the Board of Adjustment Staff Report, even if we were to assume that every subdivided lot in Georgetown were to be 100% covered with structures, the Board concluded that Lot Coverage only made up 30% of the entire project. *See* note 40 *supra.* Considering that the Georgetown subdivision includes no buildings or structures other than the dwellings on subdivided lots, it does not seem that the project's required minimum percentage of OGS of 40% under the PD provisions, *see* note 47 *supra*, necessarily relies on any space within the subdivided lots.
[53] *See* PROVO CITY CODE § 14.31.080(3)(b), Figure 14.31.080(c), which provides the following illustration:



[54] PROVO CITY CODE § 14.31.080(2)(d).

c. Favorable Interpretation

No one is saying that Provo's overlay regulatory scheme is a model of clarity in this situation.[55] Any time you take two distinct zoning chapters and "combine" them for purposes of regulating a single development, there are going to be questions on how to appropriately read the respective provisions together and apply them to new development activity. The PD overlay is a prime example of this, especially where its development standards targeting a development project as a whole—even where subdivided lots are included—stands in stark contrast to the development standards of the underlying zone that are all set forth in terms of individual lots.

Fortunately, Utah law provides the rule of thumb to handle such conflicts. In reviewing a land use application, the land use authority must apply the plain language of land use regulations. If a restriction is not plainly stated, the land use authority must interpret and apply those regulations to favor the land use application.[56] Because zoning ordinances are in derogation of a property owner's common-law right to unrestricted use of his or her property, provisions therein restricting the use of property should be strictly construed, and provisions permitting property uses should be liberally construed in favor of the property owner.[57]

Therefore, in the case of overlay zones combined with underlying base zoning districts, any seemingly conflicting provisions are to be interpreted so that the interpretation more favorable to allowing the use of property prevails. As discussed, we conclude that by reading the R2 provisions and PD overlay provisions together as a whole, they do not conflict. The PD provisions expressly state when underlying zoning requirements do, and do not, apply. Nevertheless, any ambiguity that should result from the combination of the zones would be interpreted to liberally construe the applicable provisions to favor development under Utah law.

Provo City appropriately interpreted its land use ordinances so as not to prohibit the deck expansion permit within the R2(PD) zone where there remained any doubt as to whether the development standards of the PD overlay for the overall project, or the individual lot requirements of the R2 zone, applied. Despite objection from Ms. Loftus and any perceived negative impact on the enjoyment of her property, the property rights considered in the City's decision are those of the land use applicant. This, however, does not affect in any way any claim she would otherwise have against the Flakes under applicable private agreements or other remedies available at law, if any.

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[55] For example, the Performance Development Overlay Zone, specifically, is plagued with inconsistencies, such as contradictory internal references to the zone as the "Planned Development Zone". *See* PROVO CITY CODE §§ 14.31.040, 14.31.050. Additionally, the chapter was amended in 2017 to eliminate redundant approval processes with the subdivision chapter, and to streamline inconsistent usage of terms describing required plans for approval in favor of "concept plan" and "final project plan". *See* Ordinance 2017-14, April 27, 2017. However, despite the amendment, there remains instances of rogue terms within the PD chapter, such as "development plan", that do not appear to reference anything distinct from the concept/final project plan procedure. *See, e.g.,* PROVO CITY CODE §§ 14.31.050, 14.31.080, 14.31.150, and 14.31.170.

[56] UTAH CODE § 10-9a-306.

[57] *Patterson v. Utah Cty. Bd. of Adjustment*, 893 P.2d 602, 606 (Utah Ct. App. 1995).

IV. Applicability of State Construction and Fire Codes

Ms. Loftus additionally argues that the new deck is not compliant with fire code provisions of the International Residence Code (IRC). The City is dismissive of this claim and simply asserts that such fire code questions are outside of specific statutory sections that the Ombudsman's Office has jurisdiction to review.[58] The City's statement reflects a myopic view of our statute and the purpose of our office. The City tries to distinguish the IRC issue= raised by Ms. Loftus as not expressly listed as a topic for a request for an advisory opinion and therefore "immaterial to what she has asked the Ombudsman Office to opine on – whether Provo City correctly issued the 2020 permit." However, the City fails to recognize that in its plea for our office to only answer the question of whether the permit was properly issued, this necessarily includes whether the City has "compl[ied] with mandatory provisions of [applicable land use] regulations"[59]—including the IRC as adopted by the State Construction Code, as well as the State Fire Code, where applicable.[60] Additionally, we note that state law gives our Office express authority to review a fire code official's interpretation of the State Fire Code where applied to a development approval.[61]

That being said, the fire code issue is not adequately briefed. Ms. Loftus merely asserts that upon viewing the deck and French doors, an inspector made comment of "a violation of R302.1", of which a link to Section R302.1 of the IRC is provided.[62] No other explanation or further argument is provided. Utah has adopted the 2015 edition of the IRC, subject to amendments found in the State Construction and Fire Codes Act, which are "the construction standards to be applied to building construction, alteration, remodeling, and repair, and in the regulation of building construction, alteration, remodeling, and repair in the state."[63]

Section 302.1 of the IRC addresses fire-resistant construction of exterior walls. But, as mentioned, no argument is articulated by Ms. Loftus as to *why* the Flakes' improvements allegedly do not comply with this requirement. As we have no further information, we make no determination as to the compliance of the improvements with the IRC. We note, however, that because the State Construction Code governs the construction, alteration, or remodeling of a building within the state, the City must ensure that any building permit approved is compliant with State Construction Code provisions, including the IRC section cited by Ms. Loftus.

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[58] Citing to Section 13-43-205 of the Property Rights Ombudsman Act, which lists as eligible for an advisory opinion a determination of compliance with specifically enumerated sections of the Municipal/County LUDMA statutes, as well as Utah's Impact Fee Act. UTAH CODE ANN. § 13-43-205(1)(a).
[59] UTAH CODE ANN. § 10-9a-509(2).
[60] *See* note 62 *infra*, and accompanying text.
[61] UTAH CODE § 15A-5-202 ("For development regulated by a local jurisdiction's land use authority, the fire code official's interpretation of this code is subject to the advisory opinion process described in Utah Code, Section 13-43-205, and to a land use appeal authority appointed under Utah Code, Section 10-9a-701 or 17-27a-701.").
[62] Specifically, Ms. Loftus provided the following link: https://up.codes/viewer/utah/irc-2015/chapter/3/building-planning#r302.
[63] UTAH CODE ANN. § 15A-2-103(1).

CONCLUSION

Because the development standards of the PD provisions supplant the individual lot development standards of the underlying R2 zone where zoned R2(PD), there are no applicable setback or lot restrictions on the subdivided Georgetown lots that would prohibit the expansion of a deck on the rear of a townhome. The City therefore appropriately approved the deck permit under its land use ordinances, assuming the deck structure complies with the state construction code. The City's decision to approve the permit does not affect any private cause of action that may apply due to the landowner's use of the property.

Jordan S. Cullimore, Lead Attorney
Office of the Property Rights Ombudsman

NOTE:

This is an advisory opinion as defined in Section 13-43-205 of the Utah Code. It does not constitute legal advice, and is not to be construed as reflecting the opinions or policy of the State of Utah or the Department of Commerce. The opinions expressed are arrived at based on a summary review of the factual situation involved in this specific matter, and may or may not reflect the opinion that might be expressed in another matter where the facts and circumstances are different or where the relevant law may have changed.

While the author is an attorney and has prepared this opinion in light of his understanding of the relevant law, he does not represent anyone involved in this matter. Anyone with an interest in these issues who must protect that interest should seek the advice of his or her own legal counsel and not rely on this document as a definitive statement of how to protect or advance his interest.

An advisory opinion issued by the Office of the Property Rights Ombudsman is not binding on any party to a dispute involving land use law. If the same issue that is the subject of an advisory opinion is listed as a cause of action in litigation, and that cause of action is litigated on the same facts and circumstances and is resolved consistent with the advisory opinion, the substantially prevailing party on that cause of action may collect reasonable attorney fees and court costs pertaining to the development of that cause of action from the date of the delivery of the advisory opinion to the date of the court's resolution. Additionally, a civil penalty may also be available if the court finds that the opposing party—if either a land use applicant or a government entity—knowingly and intentionally violated the law governing that cause of action.

Evidence of a review by the Office of the Property Rights Ombudsman and the opinions, writings, findings, and determinations of the Office of the Property Rights Ombudsman are not admissible as evidence in a judicial action, except in small claims court, a judicial review of arbitration, or in determining costs and legal fees as explained above.

The Advisory Opinion process is an alternative dispute resolution process. Advisory Opinions are intended to assist parties to resolve disputes and avoid litigation. All of the statutory procedures in place for Advisory Opinions, as well as the internal policies of the Office of the Property Rights Ombudsman, are designed to maximize the opportunity to resolve disputes in a friendly and mutually beneficial manner. The Advisory Opinion attorney fees and civil penalty provisions, found in Section 13-43-206 of the Utah Code, are also designed to encourage dispute resolution. By statute they are awarded in very narrow circumstances, and even if those circumstances are met, the judge maintains discretion regarding whether to award them.

MAILING CERTIFICATE

Section 13-43-206(10)(b) of the Utah Code requires delivery of the attached advisory opinion to the government entity involved in this matter in a manner that complies with UTAH CODE § 63-30d-401 (Notices Filed Under the Governmental Immunity Act).

These provisions of state code require that the advisory opinion be delivered to the agent designated by the governmental entity to receive notices on behalf of the governmental entity in the Governmental Immunity Act database maintained by the Utah State Department of Commerce, Division of Corporations and Commercial Code, and to the address shown is as designated in that database.

The person and address designated in the Governmental Immunity Act database is as follows:

Amanda Ercanbrack, City Recorder
Provo City
351 West Center Street
Provo, Utah 84601

On this ___ Day of _____, 2020, I caused the attached Advisory Opinion to be delivered to the governmental office by delivering the same to the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the person shown above.

_____
Office of the Property Rights Ombudsman